PETITIONER'S BRIEF

ARGUMENT

NO CROSS-EXAMINATION ALLOWED

I

No opportunity to cross-examine the witnesses was given at any time. Their dehors the record testimony was the sole origin of the charges and but for the same the finding of guilt as to any of the charges would have been unthinkable. This testimony was perjured and known to the State to be such when given. Petitioner has been denied his day in Court, notwithstanding the sham and pretense of a trial.

The only testimony considered against petitioner was given by two self-confessed perjurers in the *Hines* case wherein petitioner was not a party, had no counsel and no opportunity either in that case or at any subsequent time to cross-examine them. Their testimony had been excluded by the referee in the removal case and likewise by the referee in this case. Petitioner in his answer, as well as in his testimony, consistently denied each of the charges (R. 687, 38, 41-2, 548, 564). The utter lack of evidence against petitioner is made more apparent by the Appellate Division's seizing and relying upon this testimony repeatedly from the Hines record. It frankly stated that it had "examined" that record, quoted and summarized testimony from it and referred to newspaper accounts of the Hines trial. Petitioner duly objected to the admission of the testimony of these witnesses without cross-examination and has done nothing to waive or lose the right of that objection. His objection was duly acquiesced in by the prosecution and sustained by the referee (R. 73-4). Like action had been taken by the referee in the removal action. The Appellate

Division's thus violating his Federal Constitutional right to cross-examine these witnesses before its use of their testimony was duly raised on the appeal before the Court of Appeals, which merely affirmed without opinion.

The testimony of these witnesses relating to one of petitioner's decisions as a Magistrate was only as to alleged conversations between themselves and with Hines about petitioner; their testimony relating to the other decision was as to having had the case "steered" to petitioner, which was afterward found to be perjured, as shown by the court minutes as to what had actually taken place before the case reached him. The conclusions of the Appellate Division with respect to each of the charges against petitioner are so permeated and dominated by the testimony of these two witnesses (*Hines* case) that they demonstrate that they were influenced by the testimony of these witnesses. The conclusions, in fact any of them, would have been unthinkable but for this testimony (opinion, 258 A. D. 470).

Petitioner's raising the right to cross-examine these witnesses was not a mere technicality, for such cross-examination would not only have shown the falsity of their "steering" tale, but also of their other material statements as to him. For brevity, only one other example will be given. They testified (*Hines* case) their policy business was ruined by the arrest and conviction of all the defendants in the "Maloney Bank Case", a fictitious name, in which each of the defendants had been charged with the possession of policy slips. (Hines Appeal Record, 523-7, 754, 1660-2, 1809-10.) The following facts, material to petitioner's defense, would have been disclosed by cross-examination, but were suppressed in their testimony. The defendants in that case were arraigned before petitioner as a Magistrate (February 20, 1934) and very high bail was fixed by him for each of them. At the same time he took judicial notice of the widespread evils of the policy game, denounced the operators and encouraged the police and the newspapers in their drive to suppress it.

The legal title of the case was *People* v. *Ellis, et al.* (243 A. D. 522; 266 N. Y. 664). All the defendants were not convicted. The evidence in Special Sessions showed that all the defendants were seen handling policy slips except two of them, who said they worked in the premises as cooks. These two were discharged on the People's evidence (Id. Appeal Record, p. 38).

Thereafter, certificates of reasonable doubt as to all those convicted were successively granted permitting appeals to the Appellate Division (1934) and to the Court of Appeals (1935). If all these facts had been brought out, it would have been disclosed that the two cases decided by petitioner were not "perfect cases", but that the higher courts were applying the same rule of law as to constructive possession of policy slips as was applied by petitioner in his two decisions; that petitioner was not a "tool" of the policy racketeers, but without restraint enforced the law as he understood it against them (R. 551-3).

Notwithstanding the sham and pretense of a trial, petitioner has been denied, as this Court has said in *Holden* v. *Hardy* (169 U. S. 366, 389) the

> "immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard."

A fair trial in a court action, guarded by common law rules of evidence, has been always accorded to lawyers in New York in proceedings to discipline them. The principles by which such a trial must be safeguarded were so clearly stated by the Court of Appeals in *Matter of Eldridge*, 82 N. Y. 161, that they are now classics in the law as is shown by their repeated quotations by that and other courts. That court said with respect to such an action against a lawyer (Id. 167-):

> "Upon the return of that order (to show cause) the accused is heard. He may confess, he may explain, he may deny. If he confess, the court may at

> once render its judgment. If he explain, the court may deem the explanation sufficient, or the reverse. But if he meets accusation with denial, the issue thus raised is to be tried, summarily it is true, by the court itself, or by a referee, but nevertheless to be tried, and on that trial the accused is not to be buried under affidavits or swamped with hearsay, but is entitled to confront the witnesses, to *subject them to cross-examination*, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen."

The Court in *Matter of Long*, 287 N. Y. 449, held that an adjudication in another action could not be considered as adjudicated in the summary proceeding against the attorneys so as to deprive them of their right of cross-examination, saying (Id. 454-):

> "In the opinion by the Justice at Special Term the statement is made that the decision rests in part upon evidence taken in the incompetency proceeding. But such evidence is not printed in the record before us. Furthermore, no opportunity was given the respondent attorneys either to call witnesses or to confront and *cross-examine the witnesses* from whom came evidence upon which is based the present charge of professional misconduct. * * * We merely point out that the respondent attorneys are entitled at least to an opportunity to be heard—to test the basis of the charge against them *by cross-examination of witnesses* and to offer evidence which may affect the conclusion by the Court upon facts of record. (Citing cases.)"

In *Matter of Weitling*, 266 N. Y. 184, 187, the court in discussing the rights of an attorney on a charge of unprofessional conduct said:

> "In a matter of such importance the witnesses should be produced in court subject to *cross-examination.*"

This Court in *Truax* v. *Corrigan*, 257 U. S. 312, 331, said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. * * *"

In discussing the equal protection clause, the latter opinion quotes from *Barbier* v. *Connolly*, 113 U. S. 27, 31, as follows:

> "Equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

This Court in deciding that the Fourteenth Amendment protects every person from the State's unduly depriving him of his right to pursue his calling, said in *Smith* v. *Texas*, 233 U. S. 630, 636:

> "In so far as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional

guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling."

Due process of law, this Court held in *Cooke* v. *United States*, 267 U. S. 517, 537, requires that a lawyer accused in that case of contempt:

> "• • • should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel • • •".

The assistance of counsel, of course, would include his assistance in cross-examining the witnesses.

In *Powell* v. *Alabama*, 287 U. S. 45, 69, this Court said:

> "• • • If in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.
>
> • • • • •
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> (p. 68) "• • • And Mr. Justice Field, in an earlier case, *Galpin* v. *Page*, 18 Wall. 350, 368-369, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered'."

In a proceeding to disbar an attorney (*Garfield* v. *U. S. Ex Rel. Spalding*, 32 App. D. C. 153, 158), the Court said:

> "• • • Due process of law in such cases requires specific charges, due notice of the same, an opportunity to make specific answers to them, *an opportunity to cross-examine the witnesses in support of them*, an opportunity to adduce testimony in contra-

diction of them, and an opportunity for argument upon the law and facts. *United States Ex Rel. Wedderburn* v. *Bliss,* 12 App. D. C. 485, 493.

"In considering other charges than those which the relators were called upon to answer, and founding his order of disbarment thereon, the Secretary acted in excess of his jurisdiction in the premises. *Even if the charge made warranted the broad interpretation, still, the relators had denied the specific one,* and their answers contained no admission of guilt in any other respect. *Consequently a finding* against them must necessarily have been founded *on testimony taken without notice* to them, and *without opportunity to cross-examine the witnesses,* and to the consideration of which they did not assent in any way.

"We are of the opinion that the learned trial justice was right in holding that the *proceeding was a denial of due process* of law, and the judgment in each case will be affirmed, with costs."

This decision was cited with approval by this Court in *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 123.

NO NOTICE AND NO HEARING OF ADDITIONAL CHARGES ON WHICH THE DECISION WAS BASED

II

The irregularity violating petitioner's federal constitutional rights was not in the admission of incompetent evidence but in deciding the case on testimony expressly excluded without which there would be no basis for any of the Court's conclusions.

Ordinarily in a New York disbarment proceeding the opinion of the Appellate Division (formal findings not being made) would disclose the grounds for the decision. In this case, however, the opinion (per curiam, by two Justices)

adopts the grounds "stated in detail" in the opinion (majority) which the same Justices (acting in an executive capacity) wrote in removing petitioner as a Magistrate, and finds the disbarment is on the "same evidence". Consequently an intrinsic examination of the removal opinion (Majority, 258 A. D. 470) is necessary to find the grounds and evidence upon which the disbarment decision rests.

No other proceeding under the well-settled New York law may be res judicata or have any probative force or evidentiary value in a disbarment proceeding, which must be begun ab initio and proceed according to the rules of a common law trial. The disbarment opinion (per curiam) does not purport to modify or change that rule.

Matter of Tanz, 233 A. D. 300, 1st Dept.;
Matter of Lynch, 227 A. D. 477, 1st Dept.;
Matter of Long, 287 N. Y. 449, 454;
Matter of Eldridge, 82 N. Y. 161, 166.

In *Matter of Kaufman,* 245 N. Y. 423, 428, Mr. Justice Cardozo said:

> "Upon an application for disbarment, a judgment of conviction is not conclusive against the attorney by force of any general doctrine of res adjudicata." (Citing cases).

The inapplicability of res judicata in this case was manifest because in the removal action different issues were involved for the determination of other rights and the opinion (majority, removal) was not rendered by a court (sui generis) but by an executive body. (*Matter of Droege,* 197 N. Y. 44.) The following of a prior opinion, which is only indicated by the concurring opinion of a third Justice (R. 692), could not deprive petitioner of his federal Constitutional rights duly raised in this action (*Southern Rwy. v. Clift,* 260 U. S. 316, 319).

The conclusions in the opinion (majority, removal), which are adopted by the opinion (per curiam) in this case

are permeated and dominated by the dehors the record testimony (*Hines* case), as will be presently pointed out. The court's thus considering the dehors the record testimony, after the case had been submitted for decision and without notice, can not deprive petitioner of his Federal Constitutional rights to the assistance of counsel and to offer evidence in rebuttal thereto. This court in *Saunders* v. *Shaw* (244 U. S. 317, 319), said that the defendant in that case

> "was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view"

and that the State had denied him due process of law where its Supreme Court had reversed the judgment in his favor by considering the testimony held inadmissible by the trial court and no further remedy was available to him in the state courts.

In this disbarment proceeding all the hearings were before a referee. The matter was submitted without oral argument to the Appellate Division. The referee had expressly sustained objections to the admission of the dehors the record testimony (*Hines* case) and questioning about the same (R. 73-74). Under the petitioner's denial of "all the charges" (referee's report R. 687), he could not be fairly held to have had notice that such testimony (*Hines* case) and the additional charges arising therefrom would be considered by the Appellate Division.

Justice Cardozo (*People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470) succinctly stated the rule as to the notice required in a disbarment case:

> "True, indeed, it is that disbarment may not be ordered without notice of the specific charges" (Citing cases).

This Court (*Cook v. United States, supra*) in holding that due process requires notice should be given of the

specific charges that are to be considered against an attorney, said (p. 538):

> "In cases like this, where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, *the court can not exclude evidence in mitigation.* It is a proper part of the defense. There was a suggestion in one of the remarks of the petitioner to the court that, while he had dictated the letter he had not read it carefully, and that he had trusted to the advice of his partner in sending it; but he was not given a chance to call witnesses or to make a full statement on this point. * * *
>
> "On the other hand, *when the court came to pronounce sentence, it commented* on the conduct of both the petitioner and his client in making scandalous charges in the pleadings against officials of the court and charges of a corrupt conspiracy against the trustee and referee in bankruptcy, and in employing a detective to shadow jurymen while in charge of the marshal, and afterwards to detect bribery of them, *in proof of which the court referred to a sworn statement of the detective in its hands, which had not been submitted to the petitioner or his client.* * * *
>
> "It was quite clear that *the court considered the facts thus announced* as in aggravation of the contempt. Yet *no opportunity had been given* to the contemnors even *to hear these new charges of the court,* much less to meet or explain them, before the sentence. We think *the procedure pursued was unfair and oppressive* to the petitioner."

This Court in considering the prerequisites for a disbarment action (*Bradley* v. *Fisher,* 13 Wall. 335, 354), said:

> "* * * the power of the court should never be exercised without *notice* to the offending party *of the grounds of complaint* against him, and *affording him* ample *opportunity of explanation and defense. This* is a rule of natural justice, and *is as applicable* to cases where a proceeding is taken to reach the right

> of an attorney to practice his profession *as it is when the proceeding is taken to reach his real or personal property.*"

A frank statement by the Appellate Division of its having reached its conclusions "after careful examination of the testimony in the *Hines*" case is found in the opinion (majority, removal, 258 A. D. 470, 485).

That opinion at the outset summarizes the testimony in the *Hines* case (dehors the record) against petitioner and continues with the statement that "*additional testimony* was adduced" in the removal action against him (Id. 472). "Additional testimony" undoubtedly indicates that the court had in mind and considered the testimony summarized from the *Hines* case. There was no other testimony to which it could have had reference. Another indication of the court's reliance on that testimony (*Hines* case) is found in its statement:

> "The attitude of the magistrate in two separate and distinct cases coming before him *under the circumstances disclosed*, where the overwhelming evidence warranted a holding, casts doubt upon his testimony that he was not influenced by matters outside the record" (Id. 479).

There were no "circumstances disclosed" in the record under which the cases came before the petitioner and the Court undoubtedly was referring to the testimony of the two witnesses in the *Hines* case.

The conclusions that petitioner "was subservient to the conspirators" in the Hines-Schultz conspiracy and that Hines could have a policy "case disposed of favorably" (Id. 471) in petitioner's court were clearly drawn from the *Hines* case testimony, since those were additional charges not made against petitioner in the action, and there was no evidence offered to support them.

The additional charges, "full knowledge", "beholden", "aided" and "so-called benefactors", contained in the fol-

lowing quotation from the opinion (majority, removal) were not contained in the charges of which petitioner had notice in either action and no opportunity to rebut by proof. No evidence was offered in either proceeding to prove them. No opportunity for "full knowledge" was afforded petitioner except what he may have read in the newspapers. The full statement is as follows (Id. 480):

> "* * * It must be borne in mind that when Magistrate Capshaw offered himself as a witness in the *Hines* case he did so with full knowledge of the fact that several of the principals who were participants in the conspiracy had made complete confessions and had divulged the minute details of the numbers racket as operated by "Dutch" Schultz. Some of the criminals who had been aided in their unlawful activities followed the course that persons of such character frequently follow when caught. They turned State's evidence and implicated their so-called benefactors. They not only confessed their participation in the conspiracy but uncovered the whole sordid scheme. It is true, as pointed out, that one committed suicide and the other pleaded guilty, but those are not unusual results in criminal enterprises conducted on such a large scale."

These additional charges are far graver and show they actually dominated the conclusions reached on the charges of which notice was given.

The opinion (majority, removal) also contains the following additional charges:

> "In the *Hines* case these witnesses for the People gave testimony to the effect that after the arrest in the *Klein* case *the power of Hines was invoked.* Weinberg stated that Hines spoke to Magistrate Capshaw in his presence about it and the latter promised to take care of it.
>
> "Dixie Davis testified that, following the arrest of Silverstein, *the power of Hines was again called into action,* and the instructions were to proceed before Magistrate Capshaw and that it would be 'o.k.'" (Id. 480).

These accusations show the court (majority, removal) had in mind and relied on, not the record in petitioner's case, but the testimony given in the *Hines* case to which petitioner was not a party and had none of the rights of a party. No witness was called in either proceeding against petitioner to prove the facts alleged in this earlier testimony. As the court said in *Matter of H ———, an attorney,* (87 N. Y. 521, 525):

> "* * * It (Court below) ought not to have assumed a foundation fact, not even asserted on one side and explicitly denied on the other."

The opinion (majority, removal) also contains the following additional charges:

> That the testimony "given by Magistrate Capshaw in his attempt to establish his innocence and *to bring about the acquittal of Hines*" (Id. 479).
>
> "It is, of course, difficult to establish the mental operations of an individual, but the testimony given by the Magistrate in the *Hines* case to discredit witnesses and to justify his conduct *in attempting to establish the innocence of Hines* proves that his disposition of these policy cases was not prompted by a desire impartially to administer justice" (Id. 484).

These surmises that petitioner as a witness was "attempting to establish the innocence of Hines" and to "bring about the acquittal of Hines" show that its suspicions of Hines' influence over petitioner, derived solely from the Davis-Weinberg tale about the two cases, was still paramount in its mind even when it came to consider the third charge as to petitioner's testimony in the Hines trial. Without invoking that suspicion it is evident that it could not have found wrongdoing from petitioner's testimony. The court's bolstering its uncertainty about petitioner's "mental operations" in deciding the two cases by invoking its suspicion as to his intent in testifying shows that the real foundation for reaching its conclusions as to each of the three charges was the Davis-Weinberg testimony. No

charge or evidence of any such power or influence wa offered in either proceeding against petitioner. It was no even suggested during the heated Hines trial that peti tioner as a witness was under the influence of Hines. Th undisputed evidence shows that the suspicion of such influ ence was false. The weight of the same suspicion in influenc ing the court's conclusion (majority, removal) as to th third charge is shown by its other statements:

> "Magistrate Capshaw was called as a witness fo the defense on the second trial of Hines to contradic *that testimony* and the inferences arising therefro *that he had been influenced by Hines* in disposing o the *Klein* and *Silverstein* cases" (Id. 480).

"That testimony" refers to no testimony in the actio against petitioner but to the dehors the record statement of Davis and Weinberg in the Hines trial.

The court (majority, removal) invidiously bases sus picion on suspicion to find against petitioner as to either on of the three charges in violation of the well-settled rul against so doing, but without making any change in the rul as to future litigants. Firstly, a suspicion that petitione was influenced by Hines in making the decisions and upo that a suspicion that six and seven years later he was testi fying "to establish the innocence of Hines"; secondly, suspicion that petitioner was testifying to defend Hines an upon that a suspicion that petitioner's "mental operations" must have therefore been influenced to decide the two case as Hines ordered.

That basing suspicion upon suspicion was the metho used by the Majority is shown by the following quotation

> "His weak attempt in the Hines case to explai his actions, demonstrated that he was conscious o the fact that he was endeavoring to excuse conduc which he knew needed explanation." (Id. 484.)

And at another place the opinion states the Silverstein

> "discharge would be incomprehensible in the absenc of subsequent developments disclosed, to a great ex

tent, by the direct and cross-examination of Magistrate Capshaw * * *" (Id. 478).

It seems clear from these cross-suspicions that there could have been no sustaining of any one of the three charges but for "the suspicion" grounded on no charge or evidence in either proceeding against petitioner but harking back to the evidence given by Davis and Weinberg in the Hines case.

That these additional charges without notice or hearing should not have been considered by the Appellate Division against petitioner seems to have been determined by this Court in *Ex parte Bradley* (7 Wall. 364). In that case the attorney had been disbarred for contempt. This Court said (372):

> "* * * they (the court below) insist that, after the return of the relator to the rule in answering the contempt, they had a right, in considering the answer, if any other offense appeared therein cognizable by the court, it was competent to take notice of it, and inflict punishment accordingly.
>
> "We cannot assent to this view. It assumes the broad proposition, that the attorney may be called upon to answer an offense specified, and, *when the answer comes in, without any further notice or opportunity of defense* or explanation, punish him for another and distinct offense. Certainly no argument can be necessary to refute such a proposition."

In *Ex parte Robinson* (19 Wall. 505) this Court said (p. 512):

> "Before a judgment disbarring an attorney is rendered he should have notice of the grounds of complaint against him and an ample opportunity of explanation and defense. This is a rule of natural justice, and should be equally followed *when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property.*"

PETITIONER'S EVIDENCE NOT CONSIDERED

III

That the Appellate Division did not consider petitioner's evidence in this disbarment case is shown by its statement that he "offered *no evidence*" beyond his own testimony and that as to his character (R. 692).

The Appellate Division's statement (opinion, per curiam) that petitioner "offered *no evidence*" beyond his own testimony and that as to his character (R. 692), seems to show conclusively that it did not consider the material, substantial and uncontradicted evidence offered by him disproving the charges for disbarment. Its failure to consider petitioner's evidence is further shown by the statement (opinion dissenting from the order):

> "* * * but the evidence in this disciplinary proceeding must be considered" (R. 693).

The uncontradicted evidence offered by petitioner in this case included the testimony of Justice James E. McDonald, former Chief City Magistrate (R. 21-2), and also an affidavit of Colley E. Williams, Esq., (a member of the firm of Whitman, Ransom, Coulson & Goetz), showing that the ruling law and practice in the Magistrates' courts in the years petitioner's two decisions were made, were in accord with petitioner's decisions. Mr. Williams' affidavit also shows that his firm, after a research involving the examination of the records of upwards of a thousand policy cases, advised petitioner to take the witness stand in the Hines trial and vigorously defend his decisions (R. 683). There was also offered in evidence an affidavit of Hon. James J. Walker (former mayor) showing that petitioner did not obtain his appointment to the Magistrate's bench through Hines or any other politician, but because of petitioner's excellent standing and reputation as a lawyer and the indorsements presented from eminent citizens for his appointment (R. 668-9). There was also offered in evidence "a certificate of reputation" by 131

prominent citizens, including 14 judges and 86 lawyers in which they state (R. 670):

> "People who know him do not believe that those charges (in connection with the Hines case) are true."

They each made this certificate subsequent to the removal opinion showing their disbelief in the charges and their continued faith in him after his removal from office. Among those making this certificate was Justice Ferdinand Pecora, who presided at the first Hines trial and was the only judge who heard Weinberg give his perjured testimony concerning petitioner. The Hon. John W. Davis gave testimony in this case:

> "I might go further personally and say that I have never believed the testimony that was presented against him in the Hines trial" (R. 27).

To peremptorily brush aside all this testimony with a mere remark, petitioner "offered no evidence," etc., illustrates the pro forma consideration which the Appellate Division gave to this case. A minority (two Justices) gave the "per curiam" decision about eight months after the case was submitted. A majority vote was obtained from a third Justice whose opinion indicates that it was cast not because of his considering the evidence in this case but because he was "constrained" by the opinion (R. 692) in another case (removal). None of the foregoing evidence in the disbarment case had been given in the removal case. That the Appellate Division could not disregard and suppress petitioner's evidence in this case seems to have been determined by this Court in *Hovey* v. *Elliott* (167 U. S. 409) where it said (p. 413):

> "* * * a more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, *refuse to allow the party summoned to answer* or strike his answer from the files, *suppress the testimony* in his favor, *and condemn him without consideration thereof and without a hearing,* on the

theory that he has been guilty of contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. * * * (p. 417) "Can it be doubted that due process of law signifies a right to be heard in one's defense? * * * If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. *If such power obtains,* then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing the power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, *courts possess the right to inflict the very wrongs which they were created to prevent.*" (Citing *Galpin* v. *Page, supra.*)

The Appellate Division invidiously convicted and disbarred petitioner without any legal evidence to sustain the charges and in violation of the circumstantial evidence rule, the rule against basing suspicion upon suspicion and upon retroactive rulings of law, and also in violation of the Federal Constitutional guarantees to every person of due process of law and the equal protection of the laws.

IV

It is respectfully submitted that this application should be granted.

Dated: New York, N. Y.,
August 21, 1944.

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Detached Exhibits

"A"—Brief for appellant (petitioner) in the Court of Appeals.

"B"—Appellant's (petitioner's) reply brief in the Court of Appeals.

References

1—Per curiam opinion on Order of Disbarment in which presiding Justice Martin and Justice Townley concurred, may be found in the record at page 691.

2—Concurring opinion on Order of Disbarment by Justice Untermyer, may be found in the record at page 692.

3—Opinion dissenting from Order of Disbarment by Justice Dore, may be found in the record at page 693.

4—Majority opinion in the removal case against petitioner by presiding Justice Martin, may be found in 258 App. Div. 470.

5—Concurring opinion in the removal case by Justice Untermyer, may be found in 258 App. Div. 486.